Second Appellate District, Division Four, No. Bo73682
S043368

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN BANK

JOY ELAINE ELLINGTON Et Al., Petitioners

v.

LOS ANGELES COUNTY SUPERIOR COURT, Respondent

ROBERT BARBER STULL Et Al., Real Parties In Interest

Petition for review DENIED.

Chief Justice

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT

DIVISION FOUR

JOY ELAINE ELLINGTON et al., No. B073682

Petitioners, (Super.Ct. No.KC009085)

(Gregory C. O'Brien, Jr., Judge)

v.

THE SUPERIOR COURT OF
LOS ANGELES COUNTY,

Respondents;

ROBERT BARBER STULL et al.,
Real Parties in Interest

ORIGINAL PROCEEDING from a judgment of the Superior Court of Los Angeles County. Being treated as writ of mandate. Denied.

Joy Elaine Ellington and Azariah Michael Ellington, in pro per., for Petitioners.

No appearance for Respondent.

Law Offices of Charles Crismier III, Michael E. Maning, Bakken and Koester, Richard P. Delatorre, Hawkins, Schnable, Lindahl & Beck and Patrick T. Barrera for Real Parties in Interest.

STATEMENT OF THE CASE

Plaintiffs appeal from the trial court's order denying their motion to amend their complaint adding defendants and causes of action. Ultimately plaintiffs settled their case against the original defendant and filed a request for dismissal of the entire action. An order of dismissal was was entered by the court on February 16, 1994. Although plaintiffs appeal from a nonappealable order, was shall treat the appeal as a petition for writ of mandate and decide the case.

(California Dental Assn. v. California Dental Hygienists' Assn. (1990) 222 Cal.App.3d 49.)

FACTUAL AND PROCEDURAL HISTORY

Plaintiff Joy Ellington wa injured in an automobile accident with defendant Robert Stull on January 13, 1992. She and her husband, Plaintiff Azariah Ellington, engaged in negotiations with defendant Stull's insurance carrier, Nationwide Mutual Insurance Co.

Plaintiffs commenced this action by filing in propria persona a Judicial Council form personal injury complaint on

March 23, 1992, against the driver of the other vehicle, Robert Stull and his insurance carrier, Nationwide Mutual Insurance Co. The complaint contained four causes of action against both Stull and Nationwide for property damage, personal injury, "infliction of emotional distress" and loss of consortium. Plaintiffs alleged that Stull was negligent and caused the collision, which resulted in Joy Ellington suffering personal injuries and the Nationwide inflicted emotional distress by contending Joy Ellington was contributorily negligent.

Defendants demurred to the complaint on May 18, 1992. The parties engaged in correspondence about the pleadings. As a result of these negotiations, plaintiffs and defendants stipulated that plaintiff would file and amended complaint, naming as defendants Stull and Does 1 through 10, deleting Nationwide Mutual Insurance as defendant, and clarifying that their infliction of emotional distress cause of action was for negligent infliction of emotional distress. Defendant Stull demurred to the amended complaint. The

demurrer was set for hearing on July 16, 1992. The record contains an undated stipulation signed by the Ellingtons and John Walker, attorney for Stull, with respect to the filing of an amended complaint, which defendant Stull would answer. A "Second Amended Complaint", dated July 5, 1992, was filed and served by mail on Defendant Stull's attorney on August to plaintiffs' second-amended complaint, which contains a general denial and eight affirmative defenses.

Thereafter the parties apparently engaged in settlement negotiations and discovery. On December 17, 1992, plaintiffs filed a motion for leave to file a third amended complaint, which was set for hearing on January 11, 1993. The proposed third amended complaint added as parties the lawyer who represented defendant Stull, John Walker; the lawyer who represented defendant Stull, John Walker; the lawyer who represented Stull as cross-complainant, Michael Manning (although the record contains no cross-complaint). Nationwide Mutual Insurance Co., plus Does 1 through 3. Plaintiffs added a fourth cause of action for intentional

infliction of emotional distress and a fifth cause of action for perjury. Plaintiffs' three children are added as plaintiffs in the second cause of action for loss of consortium and the third cause of action for negligent infliction for emotional distress. Finally, the prayer seeks punitive damages. The reasons stated in plaintiffs' declaration supporting the motion were that defendant Stull, his insurance company, and his lawyers all participated in a scheme to have defendant Stull commit perjury in order to defeat plaintiffs' claims.

Defendant Stull, Nationwide Mutual Insurance Co., and attorney John Walker together filed an "opposition" to plaintiffs' motion for leave to file an amended complaint, contending, inter alia, there is no cause of action for perjury, that plaintiffs previously agreed not to allege intentional infliction of emotional distress, and that neither Nationwide nor Walker had anything to do with the collision or any claims arising therefrom.

There are two filings opposing the plaintiffs' motion for leave to amend -- one filed on behalf of "Defendant Robert

Stull", by Bakken and Koester, and another on behalf of "Defendant and cross-complainant" Robert Barber Stull filed by Michael Manning, a proposed defendant in the third amended complaint, of the law offices of Charles Crismier III. Plaintiffs filed a reply to the "oppositions". The trial court denied the motion to file a third amended complaint at the hearing held on January 11, 1993. From the order denying their motion, plaintiffs filed their notice of appeal on February 4, 1993.

The case was arbitrated; plaintiffs requested trial de novo; the case was set for trial on September 29, 1993 and for mandatory settlement conference on September 15, 1993. At that settlement conference, plaintiffs agreed to accept defendant Stull's $50,000 insurance policy limits plus additional amount for property damage. Subsequently, they raised questions about the loss of consortium claim and whether it would afford additional insurance policy proceeds; the trial court brought the matter before it for further hearing on October 15, 1993, at which time plaintiffs settled their

personal injury claims against Stull for $50,000 plus $5,000 for property damage. They preserved their claims against the additional defendants proposed to be added in their third amended complaint, the subject of this mandate petition.1/

DISCUSSION

The test for determining if the trial court correctly decided the motion to amend the complaint is whether abuse of discretion is shown. The trial court's ruling will be disturbed only upon a showing of a "'clear case of abuse'" [of discretion] and a "miscarriage of justice." (Denham v. Superior Court (1970) 2 Cal.3d557, 566; California Casualty Gen. Ins. Co. v. Superior Court (1985) 173 Cal.App.3d 274, 279.)

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1. On October 15, 1993, plaintiffs signed a request for dismissal of the entire action with prejudice. The request for dismissal wa ordered entered in the record on February 16, 1994. At oral argument, plaintiffs asserted they intended to dismiss defendant Stull only, having reserved their rights to proceed against the other proposed defendants both at the mandatory settlement conference and in the release document they signed. Plaintiffs also asserted the dismissal request form was prepared by defendant Stull's attorneys. While we are mindful of the fact that the trial court may have no further subject matter or personal jurisdiction over the parties once the voluntary dismissal is filed. (Harris v. Billings (1993) 16 Cal.App4th 1396, 1405), plaintiffs filed and perfected their "appeal" with this court prior to

dismissal. Thus, this court has jurisdiction to decide the matter. Abuse of discretion will not be found unless the trial court "'exceeds the bounds of reason, all of the circumstances before it being considered.'" (Denham v. Superior Court, supra, 2 Cal.3d at p. 566.)

We conclude the trial court did not abuse its discretion in denying plaintiffs' motion to file their third amended complaint.

With respect to the proposed addition of defendant Stull's insurance carrier, Nationwide Mutual Insurance Co., it has long been the rule in California that the injured plaintiff cannot join the insured tortfeasor's insurance carrier in the same action. (See Royal Globe Ins. Co. v. Superior Court (1979) 23 Cal.3d 880, 891-892, overruled on other grounds in Moradi-Shalal v. Fireman's Fund Ins. Companies (1988) 46 Cal.3d 287; Spencer v. State Farm Mut. Auto. Ins. Co. (1957) 152 Cal.App.2d 797.) The essence of the emotional distress claim arises out of the conduct of the defense of plaintiffs' lawsuit. Even a separate action may not be brought against the tortfeasor's insurance carrier on these facts. (See

Moradi-Shalal v. Fireman's Fund Ins. Companies (1988) 46 Cal.3d 287.)

Plaintiffs also sought to add their children as plaintiffs seeking loss of consortium. This cause of action is available only to spouses. (Elden v. Sheldon (1988) 46 Cal.3d 441, 446.) The children were not present at the scene of the accident. Since they had no contemporaneous awareness of any harm which their mother suffered, neither may they allege a cause of action for negligent infliction of emotional distress. (Thing v. La Chusa (1989) 48 Cal.3d 644.)

Finally, plaintiffs sought to add a cause of action for "perjury" against the insurance carrier and defendant Stull's attorneys, John Walker and Michael Manning. This claim is based on plaintiffs' contention that the insurance company, defendant Stull, and his lawyers conspired to have him lie about the facts of the collision in response to discovery propounded by plaintiffs. Even if perjury were a recognized civil cause of action (it is a crime under Penal Code, § 118), the conduct plaintiffs allege is absolutely privileged pursuant

to Civil Code section 47 (b). (Silberg v. Anderson (1990) 50 Cal.3d 205, 211-212, 218.) Thus plaintiffs may not sue the insurance carrier or defendant Stull's lawyers, either in this case or in a separate action, for the conduct alleged in the proposed cause of action for perjury.

DISPOSITION

The petition for writ of mandate is denied.
NOT TO BE PUBLISHED

NEWMAN, J.*

We concur:

VOGEL (C.S.), Acting P. J.

HASTINGS, J.

*Assigned by the Chairperson of the Judicial Council.

COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOR THE SECOND APPELLATE DISTRICT

DIVISION: 4

Azariah Ellington
18470 Bellefont Drive

Azusa, CA. 91702

RE: Ellington, Joy E.
vs.
Stull, Robet B.
2 Civil B073682
Los Angeles NO. KC009085

* * REMITTITUR NOTICE * *

Notice is hereby given that the Remittitur has been issued this date and that the opinion, decision or order entered in the above entitled cause on 10/17/94 is now final.

* * Petition Summarily Denied By Opinion * *

Respondent To Recover Costs.

JOSEPH A. LANE, Clerk
By: R. Mayfarth
Deputy Clerk

RICHARD P. DELATORRE BAR NO. 110563
BAKKEN AND KOESTER
701 North Haven Avenue, Suite 230-A
Ontario, CA 91764-4903
Telephone: (714) 466-6977

Attorneys for Defendant,
ROBERT BARBER STULL

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF LOS ANGELES, EAST DISTRICT

JOY ELAINE ELLINGTON AND AZARIAH MICHAEL ELLINGTON — CASE NO. KC009085

Plaintiffs,

vs.

ROBERT BARBER STULL and Does 1 through 10, Inclusive,

Defendants.

Notice of Ruling

TO ALL PARTIES AND TO THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that Plaintiffs Motion for Leave to File a Third Amended Complaint came before the Honorable Judge Gregory O'Brien in Department G of the East District, county of Los Angeles Superior Court at 8:30 a.m. on Monday, January 11, 1993. Plaintiffs Motion was denied.

Dated: January 14, 1993 BAKKEN AND KOESTER

RICHARD P. DELATORRE

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

DEPARTMENT G HON. GREGORY C. O'BRIEN JUDGE

JOY ELAINE ELLINGTON, ET. AL.,

PLAINTIFF,

VS. NO. KC009085

ROBERT BARBER STULL, ET.AL.,

DEFENDANT.

REPORTER'S TRANSCRIPT OF

COURT PROCEEDINGS

MONDAY, JANUARY 11, 1993

APPEARANCES:

FOR THE PLAINTIFF: AZARIAH AND JOY ELLINGTON
IN PROPRIA PERSONA
18470 BELLEFONT DRIVE
AZUSA, CALIF. 91702

FOR THE DEFENDANT: BAKKEN & KOESTER
ATTORNEY AT LAW
BY: MR. RICHARD P. DELATORRE
701 N. HAVEN AVE., STE. 230-A
ONTARIO, CALIF. 97164

FOR THE CROSS-DEFENDANT ELLINGTON: HILL, GENSON, EVEN, CRANDALL & WADE
ATTORNEYS AT LAW
BY: MR. MARC W. HAWKINS
3401 CENTRELAKE DRIVE, #650
ONTARIO, CALIF. 91764

FOR THE DEFENDANT AND CROSS-DEFENDANT: CHARLES CRISMIER III
ATTORNEY AT LAW
BY: MR. MICHAEL MANNING
424 N. LAKE AVE., SUITE 304
PASADENA, CALIF. 91101

REPORTER: LYNN A. BARBSCH, C.S.R. 2457
OFFICIAL REPORTER

MR. ELLINGTON: MR. – I DON'T MEAN TO BE TEDIOUS, YOUR HONOR, IF YOU JUST BEAR WITH ME FOR A MOMENT, IF WITHIN A DEPOSITION UNDER THE PENALTY OF PERJURY –

THE COURT: UH-HUH.

MR. ELLINGTON: AND THEIR ATTITUDE, THE EVIDENCE HAS BEFORE THE INDIVIDUALS AND THEY CHOOSE TO –

THE COURT: MR. ELLINGTON, IF YOU FEEL SOMEBODY IS LYING IN THE COURSE OF A DEPOSITION, AND THE CASE RESOLVES ITSELF BEFORE TRIAL AND YOU REALLY THINK THE DISTRICT ATTORNEY WOULD BE INTERESTED IN DOING SOMETHING ABOUT THAT, YOU MAY TALK TO THE DISTRICT ATTORNEY.

FRANKLY IT'S MY EXPERIENCE THAT YOU'RE PROBABLY NOT GOING TO GET VERY FAR WITH THAT, BUT I'M NOT GOING TO – I'M NOT GOING TO MAKE A PROSECUTORIAL DECISION, THAT'S NOT MY FUNCTION.

IF YOU THINK THEY'RE TELLING A LIE, AND THEY TELL IT AGAIN ON THE WITNESS STAND, YOU CAN POINT OUT TO THE JURY. "LADIES AND GENTLEMEN OF THE JURY, THESE PEOPLE ARE LYING." OBVIOUSLY BUT YOU DON'T FILE AND AMENDED COMPLAINT SAYING, **"LIAR, LIAR, PANTS ON FIRE."** OKAY? YOU JUST DON'T DO THAT.

OKAY. MR. AND MRS. ELLINGTON, I'M GOING TO DENY YOUR MOTION TO FILE YOUR AMENDED COMPLAINT AND COUNSEL, WHO'S GOING TO GIVE NOTICE? MR. DELATORRE?

MR. MANNING: I'D BEEN HAPPY TO.

THE COURT: MR. MANNING.

MR. DELATORRE: I'LL GIVE NOTICE REGARDING THE REQUEST FOR FEES, YOUR HONOR.

2nd Civil No. B073682
Superior Court No. KC 009085
(Hon. Gregory C. O'Brien, Judge)

IMMEDIATE STAY REQUESTED
TRIAL DATE: SEPTEMBER 29, 1993

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION _____

JOY ELAINE ELLINGTON
AZARIAH MICHAEL ELLINGTON
CIVIL NO. B073682

Plaintiffs and Appellants,

vs.

ROBERT BARBER STULL and
Does 1 through 10 inclusive,

Defendants and Respondents.

APPELLANTS' OPENING BRIEF

On Appeal from the Judgment of the Superior Court of California, Los Angeles County

JOY ELAINE ELLINGTON
AZARIAH MICHAEL ELLINGTON
18470 Bellefont Drive
Azusa, California 91702
(818) 339-8348
Appellants
IN PROPRIA PERSONA

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JOY ELAINE ELLINGTON
AZARIAH MICHAEL ELLINGTON
18470 Bellefont Drive
Azusa, California 91702
Telephone (213) 339-8348

IN PRO PER

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

JOY ELAINE ELLINGTON, and AZARIAH MICHAEL ELLINGTON
Plaintiffs,
vs.
ROBERT BARBER STULL, and Does 1 through 10, inclusive
Defendants.

CASE NO: KC 009085
NOTICE OF MOTION FOR LEAVE TO FILE AMENDED COMPLAINT: DECLARATION AND POINTS AND AUTHORITIES IN SUPPORT
DATE: JANUARY 11, 1993
TIME: 8:30 a.m.
DEPT: G
TRIAL DATE: NONE

TO EACH PARTY AND ATTORNEY OF RECORD IN THIS ACTION:

PLEASE TAKE NOTICE THAT on January 11, 1993, at 8:30 a.m., or as soon thereafter as counsel can be heard, Plaintiffs JOY ELAINE ELLINGTON and AZARIAH MICHAEL ELLINGTON will move this court in Department "G" thereof, at the above entitle Court, located at 400 East Civic Center Plaza, Pomona, California, for an order permitting Plaintiffs to file an amended complaint, which is attached hereto and a copy of which is served herewith.

This motion will be made upon the ground that it is in furtherance of justice to allow the filing of such amended complaint, and will be based upon this notice, the attached points and authorities, and the attached declaration of Azariah M. Ellington.

Dated: December 17, 1992

By: _____
Azariah M. Ellington
In Pro Per

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POINTS AND AUTHORITIES SUPPORTING MOTION

1. The court may, in furtherance of justice, and on such terms as may be proper, allow a party to amend any pleading or PROCEEDING. THE court may likewise, in its discretion, after notice to the adverse party, allow, upon such terms as may be just, an amendment to any pleading or proceeding in other particulars....". **[CCP section 473]**

2. It is judicial policy to resolve all disputes between the parties on their merits, and to allow amendment of the pleadings to put all such disputes at issue at the time of trial.

> "While a motion to permit an amendment to a pleading to be filed is one addressed to the discretion of the court...it is a rare case in which a court will be justified in refusing a party leave to amend his pleadings so that he may properly present his case.....If the motion to amend is timely made and the granting of the motion will not prejudice the opposing party, it is error to refuse permission to amend and where the refusal also results in a party being deprived of the right to assert a meritorious cause of action or a meritorious defense, it is not only error, but an abuse of discretion."

3. "Trial courts are vested with the discretion to allow amendments to pleadings in furtherance of justice..... That trial courts are to liberally permit such amendments at any stage of the proceeding, has been established policy in this state.... resting on the fundamental policy that cases should be decided on their merits."

[**Hirsa v. Supperior Court (Vickers)** (1981) 118 CA3d 486, 173 Cal.Rptr. 418]

4. Where change in law subsequent to filing original complaint demonstrates possibility of recovery on new legal theory, but same general set of facts, courts should permit amendment of complaint to set forth such theory.

[**Marasco v. Wadsworth** (1978) 21 C3d 82, 146 Cal. Rptr. 843]

Page 10 of Petition for Writ of Certiorari

Supreme Court Rule 10.1 (c)

.1. A review on writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered:

(c) When a state court or a United States court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way that conflicts with applicable decisions of this Court.

Private individual may be subject to liability under § 1983 if he or she willfully collaborated with official state actor in deprivation of federal right, while state actor may be subject to liability for action physically undertaken by private actors in violation of plaintiff's liberty or property rights if state actor directed or aided and abetted the violation. **Duares v. City of N.Y., C.A.2 (N.Y.)** 1993, 985 F3d 94

Mere recourse to state or local court procedures does not, by itself, amount to "joint activity" with state that would be sufficient to subject private party to liability under § 1983; "joint activity" theory requires, at minimum, some overt and significant state participation in challenged action. **Hoai v. Vo,** C.A.D.C. 1991, 935 F.2d 308

Private parties who corruptibly conspire with state officials to maliciously prosecute an individual act under color of state law and can be sued by the individual under federal civil rights statute; plaintiff attempting to prove such a conspiracy must show that the parties reached an understanding to deny plaintiff his or her rights, the conspiratorial acts must impinge upon the federal right, and the plaintiff must prove an actionable wrong to support the conspiracy**N.A.A.C.P. v. Hunt**, C A 11 (Ala) 1990, 891 F 2d 1555

As the language itself makes clear, the central purpose of § 1983 is to "give a remedy to parties deprived of constitutional rights, privileges and immunities by an official's abuse of his position" Monroe v Pape, 365 US 167, 172 5 L Ed 2d 492, 81 S Ct 473 (1961). The United States Constitution among other things, places substantial limitations upon state action, and the cause of action provided in 42 USC § 1983 [42 USCS § 1983] is fundamentally one for "misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law." United States v Classic, 313 US 299, 326, 85 L Ed 1368, 61 S Ct 1031 (1941). It is manifest then that all state officials as a class cannot be immune absolutely from damage suits under 42 USC § 1983 [42 USCS § 1983] and that to extend absolute immunity to any group of state officials is to negate pro tanto the very remedy which it appears Congress sought to create. Scheuer v Rhodes, 416 US 232, 243, 40 L Ed 2d 90,

94 S Ct 1683 (1974) Thus, as there is no language in 42 USC § 1983 [42 USCS § 1983] extending any immunity to any state officials, the Court has not extended absolute immunity to such officials in the absence of the most convincing showing that the immunity is necessary **Imbler v. Pachtman** 424 U.S. 409, 47 L Ed 2d 128, at 145, 96 S Ct 984

In considering a motion to dismiss, the factual allegations of the complaint must be taken as true and all reasonable inferences must be indulged in favor of the plaintiff *Mitchell v. King*, 537 F2d 385 (10th Cir 1976); *Dewell v. Lawson*, 489 F2d 877 (10th Cir 1974) A complaint should not be dismissed unless it appears beyond a doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S Ct 99, 101-102, 2 L Ed2d 80 (1957) The question is not whether a plaintiff will ultimately prevail, but whether he is entitled to offer evidence to support his claims *Scheuer v. Rhodes*, 416 U.S. 232, 236, 94 S Ct 1683, 1686, 40 LEd2d 90 (1974) **Steele v. Stephan**, 633 F Supp 950

Thus, we concluded that it is "not unfair to hold liable the official who knows or should know he is acting outside the law," and that "insisting on awareness of clearly established constitutional limits will not unduly interfere with the exercise of official judgment." *Butz v. Economou*, 438 U.S. 478, 98 S Ct 2894, at 2911, 57 L Ed 2d 895 (1978); **U.S. v. Stanley** 483 U.S. 669, at 697, 107 S Ct 3054, at 3071, 97 L Ed 2d 550

We therefore hold that government officials performing discretionary function generally are shielded from liability for civil damage insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. *Procunier v. Navarette*, 434 U.S. 555, 565 98 S.Ct. 855, 861, 55 L.Ed.2d 24 (1978); *Wood v. Strickland*, 420 U.S., at 322, 95 S.Ct., at 1001. **Harlow v. Fitzgerald** 457 U.S. 800, 817, 102 S.Ct. 2727, 2738, 73 L.Ed2d 396.

Allegation that defendants knowingly and willfully conspired and agreed among themselves to interfere with plaintiff's privacy and committed acts in controversy in furtherance of conspiracy, resulting in damages set forth in incorporated causes of action, was sufficient to state a cause of action for conspiracy to interfere with the contractual relationships and to invade privacy. **H & M Associates v. City of El Centro** (1980) 167 Cal.Rptr. 392, 09 C.A.3d 399

Federal and State Constitutions guarantee that no state shall deprive any person of life, liberty, or property without due process of law. **In re Marilyn H.** (1993) 19 Cal.Rptr.2d 544, 5 Cal.4th 295, 851 P.2d 826

Not all speech is protected by First Amendment; as speech, fraud, misrepresentation, and deceit are unprotected by First Amendment. **State v. Monastero** 1988, 424 N.W.2d 837, 228 Neb. 818, appeal dismissed 109 S.Ct. 358, 488 U.S. 936, 102 L.Ed2d 349

In general, speech mixed with conduct may be more significantly regulated than pure speech. **Farina v. U.S.** D.C.App.1993, 622 A.2d 50

Where individual violates otherwise valid criminal statute, First Amendment does not act as shield to preclude prosecution of that individual simply because his criminal conduct involves speech. **U.S. v. Riggs** N.D.Ill.1990, 743 F.Supp. 556

Fact that speech of newspaper and reporter may have been constitutionally privileged under First Amendment did not automatically protect them from private action for intentional infliction of emotional distress based on publication of article. **Upchurch v. New York Times Co.** S.C. 1993, 431 S.E.2d 558

Rule which provided that it is professional misconduct for lawyer to engage in conduct that is prejudicial to administration of justice is not vague, so as to have chilling effect on First Amendment rights. **Matter of Anderson**, 1990, 795 P.2d 64, 247 Kan. 208, certiorari denied 111 S.Ct. 985, 498 U.S. 1095, 112 L.Ed.2d 1069

Speech which is critical of court or judge is protected by First Amendment unless it presents clear and present danger that it will influence court's decision in pending case **Coleman v. Caddo Parish School Bd,** La App 2 Cir 1994, 635 So 2d 1238

"Actual malice," in defamation context, does not mean "ill will," but means knowledge that statement was false, or doubts about its truth couple with reckless disregard of whether it was false **Underwager v. Salter** C A 7 (Wis) 1994, 22 V 3d 730

Where information is from a source known to be hostile to subject against whom material is to be used, failure to investigate truth of allegations solely received from such source may support finding that publication has been made in wanton and reckless disregard of veracity **Fisher v. Larsen** (1982) 78 L Ed2d 335, 464 U S 959, 138 C A 3d 627, 188 Cal Rptr 216

Privilege for publications or broadcasts made in judicial proceeding applies only to communicative acts and does not privilege tortious courses of conduct West's Ann Cal Civ Code 47(b)(2) **Kupiec v. American Intern. Adjustment Co.** (1991), 235 Cal App 3d 1329 1 Cal Rptr 2d 371

"Privilege" for statements made in course of judicial proceeding did not preclude court from making evidentiary use of statements made during negotiation sessions in prior lawsuit in determining whether defendant in abuse of process action acted for improper "ulterior" purpose. **Oren Royal Oaks Venture v. Greenberg, Bernhard, Weiss & Karms, Inc.** (1986) 42 C.3d 1157, 232 Cal.Rptr. 567.

"In all such instances the unsuccessful party is really prevented, by the fraudulent contrivance of his adversary, from having a trial; but when he has a trial he must be prepared to meet and expose perjury then and there. He knows that a false claim or defense can be supported in no other way; that the very object of the trial is, if possible, to ascertain the truth from the conflict of evidence, and that necessarily the truth or falsity of the testimony must be determined in deciding the issue. The trial is his opportunity for making the truth appear... **Kachig v. Boothe**22 Cal.App.3d 626, 634, 99 Cal.Rptr. 393,397

Privilege for publications or broadcasts made in judicial proceedings applies to any communication (1) made in judicial or quasi-judicial proceeding, (2) by litigants or other participants authorized by law, in or out of court, (3) to achieve objects of litigation, and (4) has some connection or logical relation to action. West's Ann.Cal.Civ. Code **Kupiec v. American Intern. Adjustment Co.**235 Cal.App.3d 1329, Cal.Rptr.2d 371

We conclude that *Williams* and *Heninger* correctly held that an injured claimant has a right of recovery under *Royal Globe* only upon proof that the insured was actually liable to the third party claimant. If the insured is not liable for the claimant's injury, the claimant has no right to damages from the insured, and the claimant cannot be permitted to recover for "unfair conduct" by the insurer in refusing to settle and underlying unmeritorious claim. **Moradi-Shala v. Fireman's Fund Ins.** 46 Cal.3d 287,308,250 Cal.Rptr. 116, 129, 758 P.2d 58

"To deny the injured party the right to recover any actual damages in such cases, because they are of a nature which cannot be thus certainly measured, would be to enable parties to profit by, and speculate upon, their own wrongs, encourage violence and invite depredation. Such is not and cannot be the law..." **Parchment Co. v. Paterson P. Paper Co.** (1931) 282 U.S. at p. 564, 51 S.Ct. at p251, citing **Gilbert v. Kennedy** (1871) 22 Mich. 117, 130.

Attorneys would not be provided especially broad application of this section rendering privileged publication or broadcast made in judicial proceeding, the litigation privilege, to avoid conflict of interest that might result if attorney were forced to defend against invasion of privacy or illegal conduct claim as codefendant with clients, so as to immunize attorney from liability for alleged misconduct in aiding and abetting violation of Privacy Act [Penal Code Section 630 et seq.]. **Kimmel v. Goland** (1990) 51 Cal.3d 202, 793 P.2d 524, 271 Cal.Rptr. 191.

Title 28 § 1257. State courts; certiorari

(a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

The profession of the law possesses extraordinary powers. Lawyers can make the arrogant humble and the weak strong. In control of the course of litigation and armed with the knowledge of right and wrong, they are most able to abjure illegal or tortious conduct; it is their duty to do so. As occupants of a high public trust and officers of the court, they are expected to conform their behavior in legal affairs to a higher standard of rectitude and spirit of obedience than those who are willing to endure the dust of transgression.
Guided by oath, duty and obligation, the lawyer's path avoids the vices from which the virtuous abstain. Thus, it ill suits the profession to seek immunity for injuries inflicted while engaged in legal warfare under the protective tarpaulin of the privilege for "judicial proceedings. **Kimmel v. Goland** (1990) 51 Cal.3d 204, 213, 271 Cal.Rptr. 191, 198.

Finally, in immunizing participants from liability for torts arising from communications made during judicial proceedings, the law places upon litigants the burden of exposing during trial the bias of witnesses and the falsity of evidence, thereby enhancing the finality of judgments and avoiding an unending roundelay of litigation, an evil far worse than an occasional unfair result. **Silberg v. Anderson** (1990) 50 Cal.3d. 205, 214; 266 Cal.Rptr. 638, 643.

As indicated above, a reviewing court, should not disturb the exercise of a trial court's discretion unless it appears that there has been a miscarriage of justice. This, in Loomis v. Loomis, 181 Cal.App2d 345, 348-349 [4-6], 5 Cal.Rptr. 550, 552 [2-4], it was said: "it is fairly deducible from the cases that one of the essential attributes of abuse of discretion is that it must clearly appear to effect injustice. Discretion is abused whenever, in its exercise, the court exceeds the bounds of reason, all of the circumstances before it being considered. The burden is on the party complaining to establish an abuse of discretion, and unless there has been a miscarriage of justice a reviewing court will not substitute its opinion and thereby divest the trial court of its discretionary power." (See also City of Los Angles v. Superior Court, 271 Cal.App. 292, 294 [1], 76 Cal.Rptr. 256; Ordway v. Arata, 150 Cal.App2d 71, 78 309 P.2d 919; Estate of Hart, 119 Cal.App2d 310, 318 [12], 259 P.2d 703.) **Denham v. Superior Court of Los Angeles County**, 2 Cal.3d 557, 568, 86 Cal.Rptr 65, 71, 468 P.2d 193

If the motion to amend is timely made and the granting of the motion will not prejudice the opposing party, it is error to refuse permission to amend and where the refusal also results in a party being deprived of the right to assert a meritorious cause of action or a meritorious defense, it is not only error but an abuse of discretion. Cal.Cas**Gen. Ins. v. Superior Court** 173 Cal.App.3d 274, 279, 218 Cal.Rptr. 817, 819

Although it would have been preferable for plaintiff to have specified the basis for amendment in addition to stating the relief requested on motion to amend complaint, the error was not a ground for denying the motion to ame**Raya v. Maryatt Industries**, N.D.Cal.1993, 829 F.Supp. 1169

Leave to amend pleading should be freely granted to correct or clarify insufficient statement of court's jurisdictional basis over suit. **Jacobi v. Blocker**, E.D.Va.1994, 153 F.R.D. 84

Fact that plaintiff pleads improper legal theory in complaint does not preclude recovery under proper theory and selection of improper remedy in demand is not fatal if claim indicates that pleader is entitled to some other relief; sufficiency of pleading is tested by statement of claim, and demand for judgment is not considered part of cla**Dimuccio v. D'Ambra**, M.D.Fla.1991, 779 F.Supp. 1318

Short and plain statement of claim showing that pleader is entitled to relief, need not be factually detailed, but it must give defendant fair notice of what plaintiff's claim is and grounds upon which it rest**Gallardo v. Board of County Com'rs, Kearny County Kan.** DKan.1994, 857 F.Supp. 783

Despite statutory language indicating "reasonableness" standard, statutory sanctions for vexatious filings are not awarded unless attorney acted recklessly or in bad faith; however, unlike sanctions under Rule 11, pleading does not have to be entirely frivolous for statutory sanctions to attach, so long as finding of bad faith or recklessness is made**In re Keegan Management Co., Securities Litigation** N.D.Cal.1994, 154 F.R.D. 237

Fraud in the factum is such fraud in procurement of the execution of an instrument as results in the signer's being ignorant of the nature of the instrument he is signing. The theoretical basis of the defense of fraud in the factum is the absence of a meeting of the minds, the mutual assent necessary to the creation of a binding contract. If the signer of a contract misapprehends the terms of a document, then he has not, in fact, assented to its true terms. Signatures to written releases obtained by fraud in the factum render such releases void. Such a fraud or misrepresentation may be deemed to have induced a party's signing of a release if it substantially contributes to his decision to manifest his consent. A release of a claim of personal injuries may be rendered void on the grounds of fraud or misrepresentation regarding the nature of the claim covered by the release so long as the releasor's failure to learn the nature of the terms was not attributable to his own negligence. Where a release was obtained by fraud in the factum, the failure of a releasor to read the contracts does not prevent courts from declaring such contracts void. **Frusetta v. Hauben**(1990, 2nd Dist) 217 CA3d 551, 266 Cal.Rptr. 62.

Where part of an act, declaration, conversation, or writing is given in evidence by one party, the whole on the same subject may be inquired into by an adverse party; when a letter is read, the answer may be given; and when a detached act, declaration, conversation, or writing is given in evidence, any other act, declaration, conversation, or writing which is necessary to make it understood may also be given in evidence. **Evidence Code Section 356.**

In negligence action, statement by police officer that witness to automobile accident had told him that first driver had gone by fast was admissible as part of conversation that had already been admitted regarding second driver's ability to go through intersection. **Carson v. Facilities Development Co.** (1984) 36 C.3d 830, 206 Cal.Rptr. 136.

Further testimony of insured regarding remainder of conversation between insured and insurance representative was admissible as having some bearing upon, or connection with, admission of part of conversation in evidence and as prior consistent statements. **Sprague v. Equifax Inc.** (App. 2 Dist. 1985) 166 C.A.3d 1012, 213 Cal.Rptr. 69.

Conviction for perjury requires that accused have specific intent to make false statement under penalty of perjury; statement must be known by accused to be false at time it was made and must be willfully made. **West's Ann. Cal. Penal Code Section 118 - People v. Story** (1985 2 Dist) 168 C.A.3d 849, 216 Cal.Rptr. 158.

Police officer who would deliberately lie in affidavit in support of issuance of search warrant to mislead magistrate would be subject to prosecution for perjury, and any officer who would willfully procure another officer to commit such perjury would be guilty of subornation of perjury. **West's Ann. Cal. Penal Code Sections 118, 119, 127. -People v. Truer**(1985 5 Dist) 168 C.A. 3d 437, 214 Cal.Rptr. 869.

In perjury prosecutions, material false statement is one which is relevant to any subsidiary issue under consideration**18 U.S.C.A. Section 1621. - U.S. v. Clark** (1990 Cal.) 918 F.2d 843.

Defect, if any, in complaint charging that first driver on certain date a certain place drove tractor and trailer combination on highway in speed in excess of 50 miles per hour in violation of certain section of Vehicle Code was entirely procedural in nature and was effectively waived for all purposes in absence of objection, and therefore information charging that first truck driver and second truck driver concocted story designed to clear first truck driver of speeding charge, and that second truck driver gave false testimony preventing conviction of first truck driver sufficiently state perjury, subornation of perjury, and conspiracy to obstruct justice.**West's Ann. Vehicle Code, Sections 15, 22406, 40300, 40503. - Brown v. Superior Court** (1965) 234 C.A.2d 628, 44 Cal.Rptr. 519.

The root requirement of the Due Process Clause is that an individual be give an opportunity for a hearing before he is deprived of any significant protected interest; hearing required before termination of employment. **Zinermon v. Burch** 494 U.S. 126; 110 S.Ct. 984.

Due Process clause of Fourteenth Amendment protects an individual's rights of access to civil courts, and deprivation if this right is actionable under **Section 1983, Woodard v. Mennella**, (EDNY 1994) 861 F.Supp. 192.

The right to sue and defend in the courts is the alternative of force, and it is one of the highest and most essential privileges of citizenship, and must be allowed by each state to the citizens of all other states to the precise extent that it is allowed to its own citizens. **Chambers v. Baltimore, etc. R. Co.,** (Ohio 1907) 28 S.Ct. 34, 207 US 142, 52 L.Ed. 143.

A § 1983 conspiracy claim may arise when a private actor conspires with a state actor to deprive a person of a constitutional right under color of state law. **Dixon v. City of Lawton**, Okl., C.A.10 (Okl.) 1990, 898 F.2d. 1443.

Justice, indeed, must satisfy the appearance of justice, and this stringent rule may sometimes bar trial even by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties. **Concrete Pipe & Prod. v. Const. Laborers Pen. Tr.** (1993) 113 S.Ct. 2254, 2277

Since the causes of action in the amended complaint were different legal theories arising from the same basic facts, the alleged improper treatment of plaintiff's foot, the trial court erred in refusing to allow the complaint to be amended. **Herrera v. Superior Court** (1984) 158 Cal.App.3d. 255; 204 Cal.Rptr. 553, 556.

Allegations in state court defendant's pro se complaint, that state trial judge had acted out of spite or annoyance in refusing to sign journal entry to permit defendant to appeal, was sufficient to state claim under § 1983 for violation of defendant's due process rights. **Olson v. Hart**, C.A.10 (Kan.) 1992, 965 F2d. 940.

Purpose of rule depriving trial court of jurisdiction pending appeal in civil actions is to protect jurisdiction of appellate court; the rule prevents trial court from rendering the appeal futile by changing the judgment into something different; accordingly, whether a matter is embraced in or affected by a judgment within the meaning of this section providing that the perfecting of an appeal stays proceedings in the trial court upon the judgment or order or upon the matters embraced therein or affected thereby, depends on whether postjudgment proceedings on the matter would have any effect on the effectiveness of the appeal. **In re Marriage of Horowitz** (App. 1 Dist. 1984) 159 C.A.3d 377; 205 Cal.Rptr. 880.

I perceive no substantial countervailing reason why at the certiorari stage this federal policy should not be applied to state cases presenting arguably substantial federal questions. **American Manufacturers Mutual Insurance Co. et al. v. American Broadcasting - Paramount Theatres, Inc. (1966)** 87 S.Ct. 1

The Anglo-American system of law is based not upon transcendental revelation but upon the conscience of society ascertained as best it may be by a tribunal disciplined for the task and evironed by the best safeguards for disinterestedness and detachment. **Bartkus v. Illinois,** 359 US 121, 79 S.Ct. 676

Some of the apparent confusion over the meaning of "sham" may stem from our use of the word "genuine" to denote the opposite of "sham". The word "genuine" has both objective and subjective connotations. On one hand, "genuine" means "actually having the reputed or apparent qualities or character." Webster's Third New International Dictionary 948 (1986). "Genuine" in this sense governs Federal Rule of Civil Procedure 56, under which a "genuine issue" is one "that properly can be resolved only by a finder of fact because [it] may reasonably be resolved in favor of either party." On the other hand, "genuine" also means " sincerely and honestly felt or experienced." Webster's Dictionary, *supra*, at 948. To be sham, therefore, litigation must fail to be "genuine" in both senses of the word.6

6. *In surveying the "forms of illegal and reprehensible practice which may corrupt the administrative or judicial processes and which may result in antitrust violations," we have noted that "unethical conduct in the setting of the adjudicatory process often results in sanctions" and that "[m]isrepresentations, condoned in the political arena, are not immunized when used in the adjudicatory process." California Motor Transport, 404 US., at 512-513, 92 S.Ct., at 613. We need not decide here whether and, and if so, to what extent Noerr permits the imposition of antitrust liability for a litigant's fraud or other misrepresentations. Cf. Fed.Rule Civ. Proc. 60(b)(3) (allowing a federal court to "relieve a party ... from a final judgment" for "fraud ..., misrepresentation, or other misconduct of an adverse party"); Walker Process Equipment, Inc. v. Food Machinery & Chemical Corp., 382 U.S. 172, 176-177, 86 S.Ct. 347, 349-350, 15 L.Ed. 2d 247 (1965); id., at 179-180, 86 s.Ct., at 351-352 (Harlan, J., concurring).*

Professional Real Estate Investors v. Columbia Pictures Ind., Inc. (1993) 113 S.Ct. 1920, 1928-1929.

Mislabeling cause of action is immaterial, if facts that justify imposition of liability on defendant are alleged and proved.

Gagne v. Bertran (1954) 43 C.2d. 481, 275 P.2d. 15.

Nature and character of a pleading are to determined from its allegations, regardless of what they may be called, and the subject matter of the action and issues involved are determined from the facts alleged than from the title of the pleading. **Kreutzer v. San Diego County** (1984) 153 CA 3d 62, 100 Cal.Rptr. 322.

However, not all speech is protected by the first amendment. The U.S. Supreme court stated, in Konigsberg v. California State Bar, 366 U.S. 36, 49, 81 S.Ct. 997, 1006, 6 L.Ed. 2d 105 (1961):

> *At the outset we reject the view that freedom of speech and association ... as protected by the First and Fourteenth Amendments, are "absolutes," not only in the undoubted sense that where the constitutional protection exists it must prevail, but also in the sense that the scope of that protection must be gathered solely from at literal reading of the First Amendment.*

The Konigsburg Court noted at 49-50 n. 10, 81 S.Ct. at 1006 n. 10.

> *That view [freedom of speech is absolute], which of course cannot be reconciled with the law relating to libel, slander, misrepresentation, obscenity, perjury, false advertising, solicitation of crime, complicity by encouragement, conspiracy, and the like, is said to be compelled by the fact that the commands of the First Amendment are stated in unqualified terms: "Congress shall make no law ... abridging the freedom of speech..."*

Consequently, as speech, fraud, misrepresentation, and deceit are unprotected by the first amendment. **State v. Monastero** (Neb. 1988) 424 N.W.2d 837, 843

California Civil Code Section 47
and
California Civil Code Section 47, amended as of January 1, 1995

Re: The Malice Element

A privileged publication or broadcast is one made:

(a) In the **proper discharge** of an official duty.

(b) In any (1) legislative or (2) judicial proceeding, or (3) in any other official proceeding authorized by law, or (4) in the initiation or course of any other proceeding authorized by law and reviewable pursuant to Chapter 2 (commencing with Section 1084) of Title 1 of Part 3 of the Code of Civil Procedure, except as follows:

(2) This subdivision does not make privileged any communication made in furtherance of an act of intentional destruction or alteration of physical evidence undertaken for the purpose of depriving a party to litigation of the use of that evidence, whether or not the content of the communication is the subject of a subsequent publication or broadcast which is privileged pursuant to this section. As used in this paragraph, "physical evidence" means evidence specified in Section 250 of the Evidence Code or evidence that is property of any type specified in Section 2031 of the Code of Civil Procedure.

(3) A recorded lis pendens is not a privileged publication unless it identifies an action previously filed with a court of competent jurisdiction which affects the title or right of possession of real property, as authorized or required by law.

(c) In a communication, **without malice**, to a person interested therein, (1) by one who is also interested, or (2) by one who stands in such a relation to the person interested as to afford a reasonable ground for supposing the motive for the communication to be innocent, or (3) who is requested by the person interested to give the information.

(d) By a fair and true report in a public journal, of (1) a judicial, (2) legislative, or (3) other public official proceeding, or (4) of anything said in the course thereof, or (5) or a verified charge or complaint made by any person to a public official, upon which complaint a warrant has been issued.

(e) By a fair and true report of (1) the proceedings of a public meeting, if the meeting was lawfully convened for a lawful purpose and open to the public, or (2) the publication of the matter complained of was for the public benefit.

CALIFORNIA CIVIL CODE SECTION 47, AMENDED JANUARY 1, 1995.

The people of the State of California do enact as follows:

SECTION 1. It is the intent of the Legislature in amending Section 47 of the Civil Code to overturn the decision in **California Dredging Company v. Insurance Company of North America, 18 Cal. App. 4th 572.**

Section 2. Section 47 of the Civil Code is amended to read:

47. A privileged publication or broadcast is one made:

(a) In the **proper discharge** of an official duty.

(b) In any (1) legislative proceeding, (2) judicial proceeding, (3) in any other official proceeding authorized by law, or (4) in the initiation or course of any other proceeding authorized by law and reviewable pursuant to Chapter 2 (commencing with Section 1084) of Title 1 of Part 3 of the Code of Civil Procedure, except as follows:

(2) This subdivision does not make privileged any communication made in furtherance of an act of intentional destruction or alteration of physical evidence undertaken for the purpose of depriving a party to litigation of the use of that evidence, whether or not the content of the communication is the subject of a subsequent publication or broadcast which is privileged pursuant to this section. As used in this paragraph, "physical evidence" means evidence specified in Section 250 of the Evidence Code or evidence that is property of any type specified in Section 2031 of the Code of Civil Procedure.

(3) This subdivision does not make privileged any communication made in a judicial proceeding knowingly concealing to existence of an insurance policy or policies.

(4) A recorded lis pendens is not a privileged publication unless it identifies an action previously filed with a court of competent jurisdiction which affects the title or right of possession of real property, as authorized or required by law.

(c) In a communication, **without malice**, to a person interested therein, (1) by one who is also interested, or (2) by one who stands in such a relation to the person interested as to afford a reasonable ground for supposing the motive for the communication to be innocent, or (3) who is requested by the person interested to give the information.

(d) By a fair and true report in a public journal, of (1) a judicial, (2) legislative, or (3) other public official proceeding, or (4) of anything said in the course thereof, or (5) or a verified charge or complaint made by any person to a public official, upon which complaint a warrant has been issued.

(e) By a fair and true report of (1) the proceedings of a public meeting, if the meeting was lawfully convened for a lawful purpose and open to the public, or (2) the publication of the matter complained of was for the public benefit.